Supreme Court, U.S.
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No. 041151

IN THE SUPREME COURT OF THE UNITED STATES

ROY PITTS,
Petitioner,

v.

JAMES CROSBY,
Secretary, Florida Department of Corrections, and
CHARLIE CRIST,
Attorney General of the State of Florida
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

DAVID W. COLLINS, Esquire
Florida Bar Number 475289
Law Office of David W. Collins
310 North Jefferson Street
Monticello, Florida 32344-2057
Phone: (850) 997-8111
Facsimile: (850) 997-5852

Counsel for Petitioner

QUESTIONS PRESENTED

I. Is the conflict that exists between the holding of the Sixth Circuit in *Abela v. Martin,* 348 F.3d 164, 172-73 (6th Cir. 2003) and the holding of the Eleventh Circuit in *Coates v. Byrd,* 211 F.3d 1225 (11th Cir. 2000), as to the interpretation of the tolling provision defined in 28 U.S.C. §2244(d)(2), a violation of the equal protection component of the Due Process Clause of the Fifth Amendment when those holdings result in state prisoners in Michigan, Ohio, Kentucky and Tennessee having more time to exhaust their state remedies before filing a habeas corpus under 28 U.S.C. §2254 than do state prisoners in Florida, Georgia and Tennessee?

II. Would it violate the Rule of Lenity if the ambiguity in the definition of the AEDPA tolling provision defined in 28 U.S.C. §2244(d)(2), that ambiguity evidenced by the conflicting opinions of the Sixth Circuit in *Abela v. Martin,* 348 F.3d 164, 172-73 (6th Cir. 2003) and the Eleventh Circuit in *Coates v. Byrd,* 211 F.3d 1225 (11th Cir. 2000), is not resolved most favorably to state prisoners?

III. If the conflict between the holding of the Sixth Circuit in *Abela v. Martin,* 348 F.3d 164, 172-73 (6th Cir. 2003) and the holding of the Eleventh Circuit in *Coates v. Byrd,* 211 F.3d 1225 (11th Cir. 2000) is impermissible, then what is this Court's opinion as to the correct interpretation of the tolling provision defined in 28 U.S.C. §2244(d)(2)?

IV. If the holding of the Eleventh Circuit in *Coates v. Byrd,* 211 F.3d 1225 (11th Cir. 2000) is not the correct interpretation of the tolling provision defined in 28 U.S.C. §2244(d)(2), is the Petitioner's petition for writ of habeas corpus under 28 U.S.C. §2254 timely under this Court's opinion is as to the correct interpretation of the tolling provision defined in 28 U.S.C. §2244(d)(2)?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

CORPORATE DISCLOSURE

No corporations or subsidiaries are involved here.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit in *Roy Pitts v. James Crosby,* Case No. 04-13185-EE, issued on November 23, 2004, appears at Petitioner's Appendix A (Pet. App. A). No petition for rehearing was filed.

The Order of the Northern District of Florida, Tallahassee Division, adopting the Report and Recommendation of the Magistrate Judge in *Roy Pitts v. James Crosby, Jr.*, Case No. 4:04cv108-RH, issued June 1, 2004. (Pet. App. B)

The Report and Recommendation of Magistrate Judge of the United States District Court for the Northern District of Florida, Tallahassee Division in *Roy Pitts v. James Crosby, Jr.*, Case No. 4:04cv108-RH/WCS, issued April 22, 2004. (Pet. App. D)

JURISDICTION

The Court of Appeals' judgement was entered on November 23, 2004. Pet. App. A. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL:

The Fifth Amendment to the United States Constitution (in pertinent part) – "[no] person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

The Fourteenth Amendment to the United States Constitution (in pertinent part) – "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens...nor deprive any person of life, liberty, or property, without due process of law; nor deny...equal protection of the laws."

FEDERAL:

28 U.S.C. §2244(d)(1)
28 U.S.C. §2244(d)(2)
28 U.S.C. §2254

STATEMENT OF THE CASE

This is a 1997 criminal case involving charges of arson and extortion. On September 30, 1999, in a trial by jury, Petitioner was convicted of arson with minor injury, and extortion. On January 6, 2000, Appellant was sentenced to 25 years in prison for the arson and 5 years for the extortion.

Petitioner filed a timely appeal to the District Court of Appeal, First District of Florida, which affirmed the lower court's decision without opinion on April 27, 2001, the mandate being issued on May 15, 2001. Petitioner had until July 26, 2001 to file for certiorari to the United States Supreme Court, but did not file.

On July 26, 2002, Petitioner filed a state application for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.850, which, after an evidentiary hearing, was denied on July 21, 2003. Petitioner filed a timely appeal to the District Court of Appeal, First District of Florida, which affirmed the lower court's decision without opinion on January 15, 2004, the mandate being issued on February 2, 2004. Petitioner had until April 14, 2004 to file for certiorari to the United States Supreme Court, but did not file. *Id.*

On April 13, 2004, Petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C.§2254 in the United States District Court for the Northern District of Florida, Tallahassee Division. On April 22, 2004, the Magistrate Judge issued his Report and Recommendations (Pet. App. D), recommending Petitioner be deemed untimely based on the holding in *Coates v. Byrd,* 211 F.3d 1225 (11th Cir. 2000) (Pet. App. F).

On May 7, 2004, Petitioner filed an Objection to the Report and Recommendation of the Magistrate Judge (Pet. App. C), arguing that under the holding in *Abela v. Martin,* 348 F.3d 164 (6th Cir 2003) (Pet. App. E), a case newer than *Coates*, he would be deemed timely.

On May 17, 2004, the court issued an Order staying the case pending final ruling by the U.S. Supreme Court in *Caruso v. Abela,* 72 USLW.3506 (Jan. 20, 2004) (No. 03-1079), a case seeking review of *Abela v. Martin,* 348 F.3d 164 (6th Cir 2003).

On June 1, 2004, after the Supreme Court declined to review *Abela v. Martin,* 348 F.3d 164 (6th Cir 2003), *see Caruso v. Abela,* 124 S.Ct. 2388 (2004), the court issued its Order, accepting the Report and Recommendations of the Magistrate Judge, and ruling Petitioner's petition as untimely. (Pet. App. B)

Petitioner requested and received from the United States District Court for the Northern District of Florida, Tallahassee Division, a Certificate of Appealability, and appealed the court's ruling to the United States Court of Appeals for the Eleventh Circuit – *Roy Pitts v. James Crosby,* Case No. 04-13185-EE.

On November 23, 2004, the United States Court of Appeals for the Eleventh Circuit issued its opinion holding Petitioner's petition as untimely (Pet. App. A) based on its holding in *Coates v. Byrd,* 211 F.3d 1225 (11th Cir. 2000) (Pet. App. F).

Petitioner, who is in the custody of the Florida Department of Corrections, serving his sentence, filed his writ for petition of certiorari to the United States Supreme Court on February 21, 2004.

REASONS FOR GRANTING THE WRIT

By granting this writ, the conflict between the United States Court of Appeals for the Eleventh Circuit and the United States Court of Appeals for the Sixth Circuit as to how to interpret the tolling provision of 28 U.S.C. §2244(d)(2) can be resolved so that all state prisoners will have the same amount of time to file a habeas corpus pursuant to §2254.

ARGUMENT

Petitioner raises four questions, all based on the following facts:

The Constitution of the United States provides that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Article 1, Section 9, United States Constitution. The term is mentioned as early as the 14th century in England, and was formalized in the Habeas Corpus Act of 1679. The privilege of the use of this writ as a safeguard against illegal imprisonment

was highly regarded by the British colonists in America, and wrongful refusals to issue the writ were one of the grievances before the American Revolution.

From the earliest history of the common law, if a person were imprisoned, no matter by what authority, he had a right to the writ of habeas corpus, to bring his case before the king's bench. Habeas corpus is the only common-law tradition enshrined in the Constitution which also explicitly defines when it can be overridden. Article I, Section 9 of the Constitution says, "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." Under the Constitution, Congress is the only power which can authorize the suspension of the privilege of the writ. *Ex parte Field,* 9 Fed.Cas. 1 (#4,761) (D.Vt., 1862); *McCall v. McDowell,* 15 Fed.Cas. 1235 (#8,673) (CCD Cal.1867)

The writ's sole function is to release an individual from unlawful imprisonment; through this use it has come to be regarded as the great writ of liberty. The writ tests only whether a prisoner has been accorded due process, not whether he is guilty. The most common present-day usage of the writ is to appeal state criminal convictions to the federal courts when the petitioner believes his constitutional rights were violated by state procedure.

Until April 24, 1996, state prisoners had virtually unlimited amounts of time to file a habeas corpus in federal court, but on that date, the Antiterrorism and Effective Death Penalty Act ("AEDPA" or "Act") was signed into law and worked substantial changes to Title 28 of the United States Code, instituting an extremely restrictive time limitation period for filing. Under AEDPA, Title 28 U.S.C. §2244(d)(1) provides a one-year period of limitations for people "in custody pursuant to the judgment of a State court" to file an application for a writ of habeas corpus, with §2244(d)(2) defining a tolling provision during which time the one-year AEDPA clock stops ticking, thereby extending the time the petitioner has for filing.

As soon as the Act took effect, state prisoners and the various courts began to scramble trying to figure out how to calculate an AEDPA deadline. 28 U.S.C. §2244(d)(1) stated the following:

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -

and thereunder were four subsections, with(A) stating:

> the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

The courts now became involved in how to interpret the word "final." It was generally accepted that a judgement and sentence became final at the conclusion of direct review, that is, when the appeal was final. It was also generally accepted that if a prisoner did not file an appeal, the judgement and sentence became final at the end of the 30-day time period for filing the notice of appeal, since up until the end of that time period, he could file a notice of appeal.

If on direct appeal, the prisoner appealed an appellate decision to a higher court, things were not final until the higher court's decision was final or the time for seeking such review had expired.

In *Clay v. United States,* 537 U.S. 522, 123 S.Ct. 1072, 1075, 155 L. Ed. 2d 88 (2003), this Court determined that a federal criminal conviction becomes "final," for the purposes of calculating the one-year time period in which to move to vacate pursuant to 28 U.S.C. §2255, when the time expires for filing a petition for certiorari to contest the federal appellate court's affirmance of conviction. *Id.* at 1075. In analyzing the meaning of the word "final" this Court opined:

> Here, the relevant context is postconviction relief, a context in which finality has a long-recognized, clear meaning: Finality attaches when this Court affirms a

> conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires. *See, e.g., Caspari v. Bohlen,* 510 U.S. 383, 390, 114 S.Ct. 948, 127 L.Ed.2d 236 (1994); *Griffith v. Kentucky,* 479 U.S. 314, 321, n. 6, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987); *Barefoot v. Estelle,* 463 U.S. 880, 887, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983); *United States v. Johnson,* 457 U.S. 537, 542, n. 8, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982); *Linkletter v. Walker,* 381 U.S. 618, 622, n. 5, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965).

Id. at 1076

Thus, it was determined that for the purpose of when the AEDPA time limitation started, review was not "final" until the time for seeking higher review had expired.

The second question the courts had to wrestle with was the Act's tolling provision as contained in §2244(d)(2), which stated:

> The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Like before, where the meaning of the word "final" had to be determined in the context of the Act, here the meaning of the word "pending" needed to be determined.

The various United States Courts of Appeals began attempting to find a proper construction. The Eleventh Circuit determined in *Coates v. Byrd,* 211 F.3d 1225 (11th Cir. 2000) that if a Florida prisoner properly files a state post conviction motion, the AEDPA clock is tolled during the time during which he can seek review in a higher state court but because a petition for writ of certiorari to the United States Supreme Court is not "state review," neither the 90 days during which such could be filed tolls the AEDPA clock nor does the time during which such a

petition would be under review if the prisoner actually did file for certiorari.

This decision meant state prisoners in Florida, Georgia and Alabama, if they do file a petition for writ of certiorari to the United States Supreme Court, would have to file their federal habeas corpus before a ruling from the Supreme Court if their one-year deadline ran out.

Around the time the Eleventh Circuit made its decision in *Coates v. Byrd,* 211 F.3d 1225 (11th Cir. 2000) the Sixth Circuit made a similar determination in *Isham v. Randle,* 226 F.3d 691 (6th Cir. 2000), *cert. denied,* 531 U.S. 1201 (2001).

In 2003, the Sixth Circuit, in *Abela v. Martin,* 348 F.3d 164 (6th Cir. 2003) involving an *en banc* review by the entire panel of judges, revisited how to apply the AEDPA tolling provision defined §2244(d)(2) in light of this Court's recent decisions in *Duncan v. Walker,* 533 U.S. 167, 182 (2001) ("State post-conviction or other collateral review" means "State post-conviction [review]" and "other State collateral review."), *Carey v. Saffold,* 536 U.S. 214 (2002) ("until the application has achieved final resolution through the State's post-conviction procedures, by definition it remains 'pending.' "), and *Clay v. United States,* 537 U.S. 522 (2003) ("[t]he Courts of Appeals have uniformly interpreted 'direct review' in §2244(d)(1)(A) to encompass review of a state conviction by this Court."), and rejecting its previous holding in *Isham*, as well as existing holdings of the other Circuits, decided that the focus of section 2244(d)(2) is not on the court in which the application is pending but on the application itself and that as long as the petition for certiorari involves an application for state court relief, section 2244(d)(2) requires that the statute of limitations be tolled because the court where the application is pending is irrelevant. The Sixth Circuit pointed out that while *Duncan* clarified that "State" modifies "review," it nowhere asserts that "State" also modifies "pending."

As a result of this decision, state prisoners in the Sixth Circuit have their AEDPA clock tolled during the time a petition for writ of certiorari to the United States Supreme Court is

pending or, if they do not file one, during the 90-day time period during which they could have sought such review.

Since that decision, state prisoners in Michigan, Ohio, Kentucky and Tennessee have more time to exhaust their state remedies than do state prisoners in other states such as Florida, Georgia, and Alabama. Petitioner contends this raises questions of great public importance, including the first three of the questions raised in his petition. His fourth question pertains to Petitioner and not the public at large.

I.

Is the conflict that exists between the holding of the Sixth Circuit in *Abela v. Martin,* 348 F.3d 164, 172-73 (6th Cir. 2003) and the holding of the Eleventh Circuit in *Coates v. Byrd,* 211 F.3d 1225 (11th Cir. 2000), as to the interpretation of the tolling provision defined in 28 U.S.C. §2244(d)(2), a violation of the equal protection component of the Due Process Clause of the Fifth Amendment when those holdings result in state prisoners in Michigan, Ohio, Kentucky and Tennessee having more time to exhaust their state remedies before filing a habeas corpus under 28 U.S.C. §2254 than do state prisoners in Florida, Georgia and Tennessee under similar circumstances?

The right to equal treatment under the law comes from the Fourteenth Amendment to the Constitution. In 1868, the Equal Protection Clause was added to the Fourteenth Amendment, creating specific protections against unequal treatment by state governments.

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Equal Protection Clause was crafted after the Civil War in order to give the newly freed slaves legal protection. But it was specifically worded to provide protection of the rights of all "persons." It was used during the civil rights battles of fifty years ago and has even been used in the defense of the rights of non-citizens.

Although the Fourteenth Amendment specifically prohibits states from denying citizens equal protection of the laws it says nothing about the federal government. This Court addressed this fifty years ago in *Bolling v. Sharpe,* 347 U.S. 497 (1954). *Bolling* was a case linked to a group of four other cases that went before the U. S. Supreme court as one of the landmark *Brown v. Board of Education*[1] cases, which overturned *Plessy v. Ferguson..*[2] *Bolling* differed from the other cases subsumed under *Brown,* which argued that school segregation violated the equal protection clause of the Fourteenth Amendment, because Blacks residing in Washington D. C., could not use the Fourteenth Amendment because it prohibited *states* from denying citizens equal protection of the laws but not *the federal government.* In *Bolling*, this Court ruled that discrimination can be "so unjustifiable as to be violative of due process" and that segregation in the District of Columbia was such a case. This Court held that the Fifth Amendment's guarantee of due process extends the Court's ruling regarding states to the federal government. It's opinion clearly said as much:

> "In view of our decision that the Constitution prohibits it's states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."

Bolling, 347 U.S. at 500

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[1] *Brown v. Board of Education,* 347 US 483 (1954)

[2] Plessy v. Ferguson, 163 US 537 (1896)

The Fifth Amendment provides that "[no] person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." Since *Bolling*, this Court has issued numerous decisions holding that the Due Process Clause of the Fifth Amendment forbids the Federal Government to deny equal protection of the laws. *E.g., Hampton v. Mow Sun Wong,* 426 U.S. 88, 100 (1976); *Buckley v. Valeo,* 424 U.S. 1, 93 (1976); *Weinberger v. Wiesenfeld,* 420 U.S. 636, 638 n. 2 (1975)

This raises the question: "Is the conflict that exists between the holding of the Sixth Circuit in *Abela v. Martin,* 348 F.3d 164, 172-73 (6th Cir. 2003) and the holding of the Eleventh Circuit in *Coates v. Byrd,* 211 F.3d 1225 (11th Cir. 2000), as to the interpretation of the tolling provision defined in 28 U.S.C. §2244(d)(2), a violation of the equal protection component of the Due Process Clause of the Fifth Amendment when those holdings result in state prisoners in Michigan, Ohio, Kentucky and Tennessee having more time to exhaust their state remedies before filing a habeas corpus under 28 U.S.C. §2254 than do state prisoners in Florida, Georgia and Tennessee under similar circumstances?"

II.

Would it violate the Rule of Lenity if the ambiguity in the definition of the AEDPA tolling provision defined in 28 U.S.C. §2244(d)(2), that ambiguity being evidenced by the conflicting opinions of the Sixth Circuit in *Abela v. Martin,* 348 F.3d 164, 172-73 (6th Cir. 2003) and the Eleventh Circuit in *Coates v. Byrd,* 211 F.3d 1225 (11th Cir. 2000), is not resolved most favorably to state prisoners?

This Court, in *Bell v. United States,* 349 U.S. 81, 75 S. Ct. 620, 99 L. Ed. 905 (1955) held that, "When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity." This has become know as the "Rule of Lenity." It applies to criminal statutes that are clearly subject to differing constructions as far as the meaning goes. 28 U.S.C. §2244(d)(2) clearly applies only to

criminal matters and it is clearly ambiguous as evidenced by the conflicting opinions of the Sixth Circuit in *Abela v. Martin,* 348 F.3d 164, 172-73 (6th Cir. 2003) (*en banc*), *cert. denied sub nom. Caruso v. Abela,* 124 S.Ct. 2388 (2004) and the Eleventh Circuit in *Coates v. Byrd,* 211 F.3d 1225 (11th Cir. 2000).

This Court, in *United States v. R.L.C.,* 503 U.S. 291 (1992), analyzed the language of 18 U.S.C. §5037(c)(1)(B) – which proved to be ambiguous. Reasonable doubt remained, this Court concluded, as to whether the provision referred (i) to the maximum punishment that could be imposed if the juvenile, R.L.C., were being sentenced under the United States Sentencing Guidelines (15–21 months) or (ii) to the maximum punishment authorized by the statute defining the offense, 18 U.S.C. §1112(a) (36 months). The plurality held that they "resort to the [rule of lenity] only when a reasonable doubt persists about a statute's intended scope even after resort to the language and structure, legislative history, and motivating policies of the statute," and they conducted a search of §5037's legislative history to determine whether that clarifies the statute. Fortunately for the defendant, the plurality's extratextual inquiry was benign, finding that the "better understood" reading of §5037 was the more lenient one.

Justice Scalia, in an opinion concurring in judgement, opined that he was certain that this treatment of the venerable rule of lenity, did not venerate the important values the old rule serves. He went on to say, " '[A] fair warning,' we have said, 'should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.' " citing *McBoyle v. United States,* 283 U. S. 25, 27 (1931). Justice Scalia also pointed out that "a statute is a statute, and no matter how authoritative the history may be – even if it is that veritable Rosetta Stone of legislative archaeology, a crystal clear Committee Report – one can never be sure that the legislators who voted for the text of the bill were aware of it. The only thing that was authoritatively adopted for sure was the text of the enactment; the rest is necessarily speculation. Where it is

doubtful whether the text includes the penalty, the penalty ought not be imposed." "The rule of lenity, in my view, prescribes the result when a criminal statute is ambiguous: the more lenient interpretation must prevail."

Petitioner thus poses the question: "Would it violate the Rule of Lenity if the ambiguity in the definition of the AEDPA tolling provision defined in 28 U.S.C. §2244(d)(2), that ambiguity evidenced by the conflicting opinions of the Sixth Circuit in *Abela v. Martin,* 348 F.3d 164, 172-73 (6th Cir. 2003) and the Eleventh Circuit in *Coates v. Byrd,* 211 F.3d 1225 (11th Cir. 2000), is not resolved most favorably to state prisoners?"

III.

If the conflict between the holding of the Sixth Circuit in *Abela v. Martin,* 348 F.3d 164, 172-73 (6th Cir. 2003) and the holding of the Eleventh Circuit in *Coates v. Byrd,* 211 F.3d 1225 (11th Cir. 2000) is impermissible, then what is this Court's opinion as to the correct interpretation of the tolling provision defined in 28 U.S.C. §2244(d)(2)?

If this Court answers the first question in the affirmative, that raises the question of what this Court's opinion is as to how to interpret the AEDPA tolling provision defined in 28 U.S.C. §2244(d)(2).

IV.

If the holding of the Eleventh Circuit in *Coates v. Byrd,* 211 F.3d 1225 (11th Cir. 2000) is not the correct interpretation of the tolling provision defined in 28 U.S.C. §2244(d)(2), is the Petitioner's petition for writ of habeas corpus under 28 U.S.C. §2254 timely under this Court's opinion is as to the correct interpretation of the tolling provision defined in 28 U.S.C. §2244(d)(2)?

If this Court answers the first question in the affirmative, that raises the question of whether Petitioner's petition for writ of habeas corpus under 28 U.S.C. §2254 is timely under this Court's

opinion is as to how to interpret the AEDPA tolling provision defined in 28 U.S.C. §2244(d)(2)?

CONCLUSION

Petitioner has shown that the AEDPA tolling provision contained in 28 U.S.C. §2244(d)(2) is subject to different interpretations as evidenced by the conflicting holdings of the United States Courts of Appeals for the Sixth and Eleventh Circuits, this conflict resulting in state prisoners in the two circuits having different amounts of time to comply with the one-year time limitation for exercising their constitutional right to a habeas corpus, and that such violates the constitutional right to equal protection under the law, and that it is of great public importance that this Court resolve this conflict.

Respectfully submitted,

/s/
David W. Collins
Florida Bar No. 475289

Law Offices of David W. Collins
310 N. Jefferson Street
P.O. Box 541
Monticello, Florida 32345
Phone: (850) 997-8111
Facsimile: (850) 997-5852

Attorney for Petitioner

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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D. C. Docket No. 04-00108-CV-4-RH-WCS

ROY PITTS,

Petitioner-Appellant,

versus

JAMES CROSBY,

Respondent -Appellee.

Appeal from the United States District Court
for the Northern District of Florida

(November 23,2004)

Before BIRCH, DUBINA and BARKETT, Circuit Judges.

PER CURIAM:

This is an appeal from the district court's order dismissing petitioner Roy Pitts's petition for writ of habeas corpus brought under 28 U.S.C. § 2254. The basis for the dismissal is that Pitts's petition is barred by the one year statute of limitations. *See* 28 U.S.C. § 2244(d)(1).

The issue presented on appeal is whether this court's prior determination that a state motion for post-conviction relief tolls the federal limitation period for filing a federal habeas petition until the mandate is issued in the final state court review, rather than following the ninety-day period for seeking certiorari in the United States Supreme Court. Pitts argues that the ninety-day period for seeking certiorari review in the United States Supreme Court following the final state court decision should be included in the tolling period pursuant to § 2244(d)(2). Pitts relies on *Abela v. Martin,* 348 F.3d 164 (6th Cir. 2003) (*en banc*), *cert. denied, Caruso v. Abela,* ___U.S.___, 124 S. Ct. 2388 (2004). Unfortunately for Pitts, no matter what the Sixth Circuit said in *Abela,* we have decided the precise issue presented in this appeal in *Coates v. Byrd,* 211 F.3d 1225 (11th Cir. 2000), adverse to Pitts's position. *See also Rhine v. Boone,* 182 F.3d 1153, 1155 (10th Cir. 1999); *Ott v. Johnson,* 192 F.3d 510, 513 (5th Cir. 1999); *Miller v. Dragovich,* 311 F.3d 574, 580 (3rd Cir. 2002); *Bunney v. Mitchell,* 241 F.3d 1151, 1155-56 (9th Cir. 2001), *withdrawn on other grounds,* 249 F.3d 1188 (9th Cir. 2001); *Crawley v. Catoe,* 257 F.3d 395, 399-401 (4th Cir. 2001); and *Snow v. Ault,* 238 F.3d 1033, 1035 (8th Cir. 200 1). Accordingly, based on our binding precedent, we affirm the judgment of dismissal.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

ROY PITTS,
Petitioner,

v. CASE NO. 4:04cv108-RH

JAMES V. CROSBY, JR.,
Respondent.

ORDER FOR DISMISSAL

Petitioner was convicted of arson and extortion in Florida state court and sentenced as an habitual offender to at least 25 years in prison. He seeks relief in this court by petition for writ of habeas corpus under 28 U.S.C. §2254. The Magistrate Judge's Report and Recommendation concludes that the petition should be dismissed as barred by the one-year statute of limitations. *See* 28 U.S.C. §2244(d)(1). Whether that is so depends upon whether the one-year limitations period was tolled during the 90-day period in which Petitioner could have petitioned for writ of certiorari in the United States Supreme Court challenging the state court's denial of his motion for state collateral review. *See* 28 U.S.C. §2244(d)(2) ("The time during which a properly filed application for State post conviction or other collateral review. . . is pending shall not be counted toward any period of limitation under this subsection."). There is a circuit split on this issue. *Compare, e.g., Coates v. Byrd,* 211 F.3d 1225, 1227 (11th Cir. 2000), with *Abela v. Martin,* 348 F .3d 164 (6th Cir. 2003) (en banc), *cert. denied sub nom. Caruso v. Abela,* 72 U.S.L.W. 3506, 2004 WL 193884 (May 24, 2004) (No.03-1079).

By Order Staying Proceedings entered May 17, 2004 (document 6), this action was stayed pending a final ruling by the United States Supreme Court in *Caruso v. Abela,* 72

U.S.L.W. 3506 (Jan. 20, 2004) (No.03-1079), which presented this issue.

The Supreme Court now has denied certiorari in *Abela*. *See Caruso v. Abela,* 72 U.S.L.W. 3506, 2004 WL 193884 (May 24,2004) (No.03-1079). The case at bar thus is governed by the law of this circuit as set forth in Coates v. Byrd, 211 F.3d 1225,1227 (11th Cir. 2000); *accord Steed v. Head,* 219 F.3d 1298, 1300 (11th Cir. 2000). Under that law, this action is barred by the one-year statute of limitations.[3]

For these reasons,

IT IS ORDERED:

The stay imposed by the Order Staying Proceedings (document 6) is VACATED. The Report and Recommendation (document 4) is ACCEPTED and adopted as the opinion of this court. The clerk shall enter judgment stating, "The petition under 28 U .S.C. §2254 is DISMISSED as untimely filed." The clerk shall close the file.

SO ORDERED this 1st day of June, 2004.

s/Robert L. Hinkle
United States District Judge

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[3] Petitioner also argues that the petition should be construed as timely due to the rule of lenity , but, as noted in the Order Staying Proceedings entered May 17, 2004, this court is bound to follow the law of the Eleventh Circuit. *Cf. Steed,* 219, F.3d at 1300 (rejecting argument that "the limitations period is subject to equitable tolling because [Petitioner's] calculation of the statute of limitations depended on an interpretation of a novel legal issue and he was required to interpret Section 2244(d)(2) in the absence of 'clear law'" and holding "an attorney's miscalculation of the limitations period or mistake is not a basis for equitable tolling").

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

ROY PITTS

VS CASE NO. 4:04CV108-RH

JAMES v. CROSBY, JR.,

JUDGMENT

This action came before the Court with the Honorable Robert L. Hinkle presiding. The issues have been reviewed and a decision has been rendered. The petition under 28 USC 2254 is DISMISSED as untimely filed.

WILLIAM M. McCOOL, CLERK OF COURT

June 2, 2004
DATE

s/Anita L. Sullivan
Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

ROY PITTS
Petitioner

~ vs ~ Case No. 4:04cv108-RH/WCS

JAMES V. CROSBY, JR.
Secretary, Department of Corrections,
Charles J. Crist, Jr., Attorney General,
State of Florida, et. al.
Respondent(s)
_____/

OBJECTION TO PROPOSED RECOMMENDATION

The Magistrate Judge, in his *Report and Recommendation on §2254 Petition*, of April 22, 2004 in this cause, recommends that the instant §2254 petition be summarily dismissed as untimely because §2254(d)(2) provides for tolling the one year limitations period for filing only while "State post-conviction or other collateral review . . . is pending," and because a petition for writ of certiorari to the United States Supreme Court is not an application for state review of any kind, Petitioner's clock would was not tolled during the 90 day period in which he could have filed for such review of the highest state court's decision on his state post conviction motion. Case law in support of this position is included in the Magistrate's Report.

28 U.S.C. §2244 (d)(1) states, "A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -" and (A) under that states, "the date on which the judgment

became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. §2244 involves federal review of state judgements, and although Congress nowhere said anything as to whether a state court or a federal court is doing the direct review, the majority of the Judiciary have interpreted paragraph(A) to include the 90-day time period for seeking review via certiorari to the U.S. Supreme Court.

28 U.S.C. §2244(d)(2) states, "The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." Although here, too, Congress has said nothing about what court the application for State post-conviction may be pending before, most, albeit not all, of the Judiciary have decided it does not include the 90-day time period for seeking review via certiorari to the U.S. Supreme Court.

We therefore have a situation where Congress has left to the Judiciary the task of imputing to Congress an undeclared will. In 1955, the United States Supreme Court created the Rule of Lenity, holding that whenever such an ambiguity occurs, it should be resolved in the manner most favorable to the defendant. *Bell v. United States,* 349 U.S. 81, 83 (1955) ("When Congress has the will it has no difficulty in expressing it . . . . When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity.")

That an argument exists here of the will of Congress being unclear is not merely the opinion of Petitioner, but is evident in the recent decision of the United States Court of Appeals for the Third Circuit in *Abela v. Martin,* 348 F.3d 164 (6th Cir. 10/22/2003). The *Abela* court undertook an in-depth analysis of this very issue, resulting in six of the eleven judges, including the Chief Judge, joining in the majority opinion while the five remaining judges joined in a dissenting opinion.

As can be expected, Petitioner embraces the logic behind the majority opinion in *Abela*, holding that the word "State" in "State post-conviction" refers to the application, not the review, and that an application is "pending" until all avenue for review is exhausted – including the 90-day time period for seeking review via certiorari to the U.S. Supreme Court, but Petitioner does not contend that his petition should be deemed timely based on an argument that the majority opinion in *Abela* is more valid than the minority opinion – or the opinion(s) of any other courts – but because the decision of United States Supreme Court in *Bell* requires situations such the one before the bar *must be resolved in the manner most favorable to Petitioner.*

Based on the above, Petitioner respectfully objects to the recommendation of the Magistrate Judge in his *Report and Recommendation on §2254 Petition,* of April 22, 2004, because it is contrary to the holding of the United States Supreme Court in *Bell v. United States,* 349 U.S. 81 (1955), and Petitioner contends he is entitled to have his petition deemed timely.

Respectfully submitted,

s/ David W. Collins
DAVID W. COLLINS, Esquire
Law Office of David W. Collins
310 North Jefferson Street
Monticello, Florida 32344-2057
Phone: (850) 997-8111
Florida Bar No. 475289

Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy has been furnished by U.S. Mail delivery this 5th day of May,

2004 to the Office of the Attorney General, The Capitol, Tallahassee, Florida 32399-1050.

s/ David W. Collins
DAVID W. COLLINS, Esquire
Florida Bar No. 475289

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

ROY PITTS,
Petitioner,

vs. 4:04cv108-RH/WCS

JAMES V. CROSBY, JR.,
Respondent.
_____/

REPORT AND RECOMMENDATION ON § 2254 PETITION

Petitioner, through counsel, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 and supporting memorandum. Docs. 1 and 3.

There is a one year limitations period for filing a § 2254 petition. 28 U.S.C. § 2244(d)(1). The period generally runs from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." § 2244(d)(1)(A).[4] According to Petitioner, his conviction was affirmed on April 27, 2001, and he had until July 26, 2001, to file a petition for writ of certiorari. Doc. 1, p. 2. His conviction therefore became final on July 26, 2001. Clay v. United States, 537 U.S. 522, 123 S.Ct. 1072, 1075, 155 L.Ed.2d 88 (2003).

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[4] The limitations period runs from the latest of the following: the date on which the judgment became final; the date on which an unconstitutional impediment which prevented the applicant from filing is removed; the date on which the right asserted was recognized by the Supreme Court and made retroactive on collateral review; or the date on which the factual predicate for the claim could have been discovered by due diligence. § 2244(d)(1)(A)-(D). None of the later dates is implicated here.

Petitioner filed a Fla.R.Crim.P. 3.850 motion one year later, on July 26, 2002. *Id.* "The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward" the one year period. § 2244(d)(2). The denial of Rule 3.850 relief was affirmed on appeal, rehearing was denied, and the mandate issued on February 2, 2004. Doc. 1, p. 3. Petitioner asserts that he had until April 14, 2004, to file a petition for writ of certiorari. *Id.* The § 2254 petition was filed in this court on April 13, 2004.

The § 2254 petition is untimely. There was no time to spare on the one year period when Petitioner filed his Rule 3.850 motion, and the time was not tolled from that date to the filing of the § 2254 petition. Specifically, the period for seeking certiorari following the Rule 3.850 appeal is not excluded from the one year period under § 2244(d)(2).

In contrast to the language of § 2244(d)(1)(A) regarding finality, § 2244(d)(2) provides for tolling only while "State post-conviction or other collateral review . . . is pending." Coates v. Byrd, 211 F.3d 1225,1226 (11th Cir. 2000), *cert. denied,* 531 U.S. 1166 (2001) (quoting the statute); Moore v. Crosby, 321 F.3d 1377, 1381 (11th Cir. 2003) (statute "does not encompass a period of time in which a state prisoner does not have a 'properly filed' post-conviction application *actually pending in state court.*") (emphasis added).

Under § 2244(d)(2), "an application is pending as long as the ordinary state collateral review process is 'in continuance' – *i.e.,* 'until the completion of that process. In other words, until the application has achieved final resolution through the State's post-conviction procedures, by definition it remains pending." Carey v. Saffold, 536 U.S. 214, 219-220, 122 S.Ct. 2134, 2138, 153 L.Ed.2d 260 (2002). An application is considered "pending" between the lower court's decision and the filing of a notice of appeal to a higher state court. *Id.*, at 217-221, 2136-39; Nyland v. Moore, 216 F.3d 1264, 1267 (11th Cir. 2000) (Florida prisoner's post conviction motion was pending for § 2244(d)(2) purposes until the mandate issued).

A petition for writ of certiorari to the United States Supreme Court is not a an application for state review of any kind. Coates, 211 F.3d at 1226-27 (citations omitted); *see also* Duncan v. Walker, 533 U.S. 167, 172, 181-182, 121 S.Ct. 2120, 2124, 2129, 150 L.Ed.2d 251 (2001) (the word "State" applies to the entire phrase "post-conviction or other collateral review," so properly filed federal habeas corpus petition did not toll the period). "[T]he time during which a petition for writ of certiorari is pending, or could have been filed, following the denial of collateral relief in the state courts, is not to be subtracted from the running of time for 28 U.S.C. § 2244(d)(1) statute of limitations purposes." 211 F.3d at 1227; Steed v. Head, 219 F.3d 1298, 1300 (11th Cir. 2000) (following Coates to find tolling provision not applicable, also finding lawyer's miscalculation of the limitations period did not justify equitable tolling).[5]

One year after his conviction became final, Petitioner filed his Rule 3.850 motion. The time was tolled until the mandate issued on February 2, 2004. As there was no time remaining to the period, Petitioner should have filed his § 2254 petition immediately after issuance of the mandate. He did not file his petition until April 13, 2004, some 71 days late.

It is therefore respectfully **RECOMMENDED** that the § 2254 petition be **SUMMARILY DISMISSED** as untimely, and that copies of the petition, this recommendation, and the

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[5] It is noted that the Sixth Circuit has taken the contrary view, rejecting prior precedent which was admittedly "in line with a majority of our sister circuits" including Coates. Abela v. Martin, 348 F.3d 164, 167-169 (6th Cir. 2003) (other citations omitted). The Abela court found that the time for seeking certiorari tolled the limitations period under § 2244(d)(2) whether or not a petition for writ of certiorari was actually filed. *Id.*, at 167-172. *See also* 348 F.3d at 173-174 (J. Siler, dissenting) (noting that there was no circuit authority in petitioner's favor, that there was a plethora of authority to the contrary, and that "[t]he authority the majority here uses to justify its decision" was from a Ninth Circuit dissenting opinion) (citations omitted).

order adopting it be served by certified mail on the Respondent and the Attorney General of the State of Florida.

IN CHAMBERS at Tallahassee, Florida, on April 22, 2004.

s/ William C. Sherrill. Jr.
WILLIAM C. SHERRILL, JR.
UNITED STATES MAGISTRATE JUDGE

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KEVIN MARK ABELA,
Petitioner-Appellant,

v. No. 00-2430

WILLIAM MARTIN,
Director, Michigan Department of Corrections,
Respondent-Appellee.

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit

No. 99-72095—Robert H. Cleland, District Judge.

Argued: March 26, 2003
Decided and Filed: October 22, 2003

Before: BOGGS, Chief Circuit Judge; MARTIN, SILER, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, GILMAN, GIBBONS, and ROGERS, Circuit Judges.

COUNSEL

ARGUED: James Sterling Lawrence, Detroit, Michigan, for Appellant. William C. Campbell, OFFICE OF THE ATTORNEY GENERAL, Lansing, Michigan, for Appellee.

ON BRIEF: James Sterling Lawrence, Detroit, Michigan, for Appellant. William C. Campbell, OFFICE OF THE ATTORNEY GENERAL, Lansing, Michigan, for Appellee.

MARTIN, J., delivered the opinion of the court, in which DAUGHTREY, MOORE, COLE, CLAY, and GILMAN, JJ.,

joined. SILER, J. (pp. 16-18), delivered a separate dissenting opinion, in which BOGGS, C. J., BATCHELDER, GIBBONS, and ROGERS, JJ., joined.

OPINION

BOYCE F. MARTIN, JR., Circuit Judge. This action arises from a Michigan manslaughter conviction and subsequent petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The district court found the habeas petition timely filed but denied it on the merits. Kevin Mark Abela appealed that denial. A panel of this court heard argument in this case, but it declined to reach the merits. The panel held that under this court's rule in *Isham v. Randle*, 226 F.3d 691 (6th Cir. 2000), *cert. denied*, 531 U.S. 1201 (2001), Abela's petition was not timely because the statue of limitations was not tolled by Abela's petition for writ of certiorari from the United States Supreme Court following post-conviction litigation in state court. The panel held that Abela's habeas petition was barred by the statute of limitations set forth in 28 U.S.C. § 2244(d)(1). A majority of the active judges of this court having agreed to rehear the case *en banc*, we now hold that Abela's petition was timely filed.

Abela was convicted by a jury of voluntary manslaughter and carrying a concealed weapon on July 24, 1991. He was sentenced to a term of seven to fifteen years for voluntary manslaughter and a concurrent sentence of forty months to five years for carrying a concealed weapon.

Abela appealed his conviction on February 17, 1992, by raising three issues in the Michigan Court of Appeals. The Michigan Court of Appeals affirmed Abela's conviction and sentence in an unpublished disposition. *People v. Abela*, No. 144005 (Mich. Ct. App. July 22, 1994). The Michigan Supreme Court denied Abela's delayed application for leave to appeal these issues. *People v. Abela*, No. 100783 (Mich. Mar. 31, 1995).

On August 20, 1996, Abela filed a motion for relief from judgment in the Oakland County Circuit Court, raising six claims. The motion was denied "for lack of merit on the grounds

presented." *People v. Abela*, No. 90-101083 (Oakland County Cir. Ct. Oct. 22, 1996). Abela raised the same six issues on appeal to the Michigan Court of Appeals, which also denied leave to appeal and a motion to remand. *People v. Abela*, No. 200930 (Mich. Ct. App. July 22, 1997). On August 9, 1997, Abela again raised these six issues in his delayed application for leave to appeal to the Michigan Supreme Court, which likewise denied his petition. *People v. Abela*, No. 110260 (Mich. May 28, 1998). On August 3, 1998, Abela filed a petition for certiorari with the United States Supreme Court, which was denied on October 19, 1998. *Abela v. Michigan*, 525 U.S. 948 (1998).

On April 26, 1999, before his parole term had ended, Abela sought a writ of habeas corpus pursuant to section 2254, raising the same claims as in his motion for relief from judgment (except for his claim regarding the trial court's decision to reconsider its dismissal of the concealed weapon charge). The district court issued a memorandum opinion and denied the petition for habeas relief on October 31, 2000. On December 28, 2000, the district court denied Abela's motion for a certificate of appealability.

Abela appealed his denial of the motion to this court. We granted his certificate of appealability on the issues before us on April 20, 2001.

Between August 20, 1996, and May 28, 1998, Abela sought state collateral relief in the Michigan trial, appellate, and high courts. The limitations period was clearly tolled during this period because Abela's state collateral relief motions were pending in the various state courts. *See Carey v. Saffold*, 536 U.S. 214, 220 (2002). In *Carey*, the Court held that "until the application has achieved final resolution through the State's post-conviction procedures, by definition it remains 'pending.'" *Id.* Thus, the key issue before us today is whether the one-year statute of limitations applicable to federal habeas corpus petitions is also tolled during the period in which a petitioner may seek, and the Supreme Court considers whether to grant, certiorari review of the denial of the petitioner's state collateral relief motion.

Title 28 U.S.C. § 2244(d)(1) provides a one-year period of limitations for people "in custody pursuant to the judgment of a

State court" to file an application for a writ of habeas corpus. Title 28 U.S.C. § 2244(d)(2) provides for tolling of this one-year period as follows: "The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."

For prisoners whose convictions became final prior to April 24, 1996, the effective date of the Anti-Terrorism and Effective Death Penalty Act, the one-year limitations period runs against them as of that date. *Austin v. Mitchell*, 200 F.3d 391, 393 (6th Cir. 1999). Abela's judgment of conviction became final prior to April 24, 1996, so his one-year limitations period began running on that date.

The Supreme Court recently concluded that a federal habeas corpus petition does not constitute "State post-conviction or other collateral review" in order to toll the one-year limitations period pursuant to section 2244(d)(2). *Duncan v. Walker*, 533 U.S. 167, 182 (2001). Significantly, for our purposes, the Court construed the phrase "State post-conviction or other collateral review" to mean "State post-conviction [review]" and "other State collateral review." *Id.* at 175-76. Accordingly, the section 2241(d)(1) limitations period is not tolled while federal habeas corpus proceedings are pending, because federal habeas proceedings are neither "State post-conviction" nor "other State collateral review." *Id.* at 181-82. Thus, the more narrow question presented here is whether a petition for writ of certiorari to the Supreme Court may constitute a "properly filed" and "pending" application for "State post-conviction [review]" or "other State collateral review" so as to toll the section 2244(d)(1) limitation period.

This Court's pre-*Duncan* decision in *Isham v. Randle*, 226 F.3d 691 (6th Cir. 2000), *cert. denied*, 531 U.S. 1201 (2001), upon which the panel opinion relied, dealt with the situation where a petitioner could have sought, but did not seek, certiorari review of his Ohio collateral review motion. We held that "the one year limitations period is not tolled during the ninety days in

which defendant could have petitioned the Supreme Court for a writ of certiorari . . . ." *Id.* at 692.

First, we reasoned, based on the statute's plain language, the word "State" in section 2244(d)(2) modifies "post-conviction or other collateral relief." *Id.* at 695. This court concluded that "[a] petition for certiorari to the United States Supreme Court is not 'state post-conviction relief.' Neither is such a petition 'other state collateral relief.'" *Id.* Thus, we decided, as had the Tenth Circuit, that "a petition for writ of certiorari to the United States Supreme Court is 'simply not an application for state review of any kind.'" *Id.* (citing *Rhine v. Boone*, 182 F.3d 1153, 1156 (10th Cir. 1999)). We also reasoned that our holding was bolstered by the fact that seeking certiorari in the United States Supreme Court is not a mandatory part of state court review, as it is not a prerequisite to pursuing habeas corpus. *Fay v. Noia*, 372 U.S. 391, 435 (1963). Finally, we concluded that differences in section 2244(d)(1)(A) and section 2244(d)(2) suggest that Congress did not intend section 2244(d)(2) tolling to apply to potential Supreme Court review. *Isham*, 226 F.3d at 695. Specifically, section 2244(d)(1)(A) provides that the one-year limitations period begins to run after "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review," whereas Congress neglected to use similar language in section 2244(d)(2). *Id.*

The Supreme Court has decided cases since *Isham* that cast that case in a different light. As to *Isham*'s first rationale, *Duncan* confirmed our interpretation that the word "State" in section 2244(d)(2) modifies "post-conviction or other collateral relief." 533 U.S. at 175-76. As to *Isham*'s second rationale, that petitioning for certiorari on the underlying conviction is not required in order to seek habeas corpus review, the Supreme Court's recent decision in *Clay v. United States*, 123 S. Ct. 1072, 1075, 537 U.S. 522 (2003), offers an analogy for the question before us. In that case, the Court determined that a federal criminal conviction becomes final, for the purposes of calculating the one-year time period in which to move to vacate pursuant to 28 U.S.C. § 2255, when the time expires for filing a petition for

certiorari to contest the federal appellate court's affirmance of conviction. *Id.* at 1075. The Court discussed the meaning of finality, *id.* at 1076:

> Here, the relevant context is postconviction relief, a context in which finality has a long-recognized, clear meaning: Finality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires. *See, e.g., Caspari v. Bohlen*, 510 U.S. 383, 390, 114 S.Ct. 948, 127 L.Ed.2d 236 (1994); *Griffith v. Kentucky*, 479 U.S. 314, 321, n. 6, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987); *Barefoot v. Estelle*, 463 U.S. 880, 887, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983); *United States v. Johnson*, 457 U.S. 537, 542, n. 8, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982); *Linkletter v. Walker*, 381 U.S. 618, 622, n. 5, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965).

Further, the Court noted that "[t]he Courts of Appeals have uniformly interpreted 'direct review' in § 2244(d)(1)(A) to encompass review of a state conviction by this Court." *Clay*, 123 S. Ct. at 1077, n.3 (citations omitted). The reasoning underlying the Court's decision in *Clay* is analogous to the situation before us. The Supreme Court's direct review of a federal criminal conviction is not identical to its review of a state habeas petition, but in each situation the decision of the federal appellate court and the highest court in the state, respectively, is not final, if certiorari is sought, until the Supreme Court denies certiorari, and, if certiorari is not sought, until the period for seeking certiorari expires.

Finally, as to *Isham*'s third rationale, highlighting the difference in language between sections 2244(d)(1)(A) and 2244(d)(2) as supportive of the narrow reading of the latter, the Supreme Court recently said, "'The . . . presumption--that the presence of a phrase in one provision and its absence in another reveals Congress'[s] design--grows weaker with each difference in the formulation of the provisions under inspection.'" *Clay*, 123

S. Ct. at 1079 (citing *Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 435-36 (2002)).

Isham, nevertheless, is in line with the majority of our sister circuits. The Tenth Circuit concluded, using broad language, that section 2244(d)(2) did not toll the limitations period where the petitioner had actually sought certiorari in the Supreme Court. *Rhine*, 182 F.3d at 1156. The Fourth Circuit agreed where, as here, the petitioner had actually sought certiorari. *Crawley v. Catoe*, 257 F.3d 395, 399-400 (4th Cir. 2001). Other circuits, relying on *Rhine*, have reached the same conclusion with respect to petitioners who had not actually sought certiorari review—the scenario presented in *Isham*. *See Snow v. Ault*, 238 F.3d 1033, 1035 (8th Cir. 2001); *Bunney v. Mitchell*, 262 F.3d 973, 974 (9th Cir. 2001); *Coates v. Byrd*, 211 F.3d 1225, 1227(11th Cir. 2000); *Ott v. Johnson*, 192 F.3d 510, 513 (5th Cir. 1999); *see also Isham*, 226 F.3d 691.

Until recently the Third Circuit distinguished situations where certiorari is actually sought from those where it is not. In particular, in 1999, the Third Circuit concluded that the limitations period was tolled during the period where a petitioner actually sought certiorari. *See Morris v. Horn*, 187 F.3d 333, 336-37 (3d Cir. 1999). However, subsequent to the decision in *Morris*, the Third Circuit concluded that the ninety-day period for seeking certiorari review in the Supreme Court should not be considered to toll the limitations period under section 2244(d)(2) where the petitioner has not actually sought certiorari. *See Nara v. Frank*, 264 F.3d 310, 318 & n.4 (3d Cir. 2001); *Stokes v. Dist. Attorney of the County of Phila.*, 247 F.3d 539 (3rd Cir. 2001). This distinction relied on the use of the word "pending" in section 2244(d)(2), concluding that where no petition for certiorari is actually filed, nothing can be "pending" under section 2244(d)(2). *Nara*, 264 F.3d at 318. Recently, however, the Third Circuit abandoned this distinction altogether, joining the majority of the circuits. *See Miller v. Dragovich*, 311 F.3d 574 (3d Cir. 2002). The court said, "To avoid *Duncan* we would have to hold that Congress intended to distinguish between the exercise of Supreme

Court certiorari jurisdiction and federal habeas corpus jurisdiction in enacting section 2244(d)(2)." *Id.* at 579.

The Second and Seventh Circuits adopted a narrow version of the approach taken in *Isham*, *Coates*, *Ott*, *Miller*, and *Rhine*, limiting their holdings to a rule that the period during which certiorari may be sought cannot toll the limitations period where certiorari is not actually sought. *See Gutierrez v. Schomig*, 233 F.3d 490, 491-92 (7th Cir. 2000); *Smaldone v. Senkowski*, 273 F.3d 133, 137-38 (2d Cir. 2001). The Seventh Circuit focused on whether there was any "properly filed" application where the petitioner had not sought certiorari to the United States Supreme Court, concluding that where nothing had been filed, nothing could be "properly filed" under section 2244(d)(2). *Gutierrez*, 233 F.3d at 492. The Seventh Circuit also concluded that where no petition for certiorari had been filed, nothing could be "pending" under section 2244(d)(2). *Id.* Ultimately, however, the Seventh Circuit declined to address whether "State post-conviction" review or "other state collateral review" may include a "properly filed," "pending" petition for certiorari to the United States Supreme Court. *Id.* The Second Circuit, likewise faced with a situation where the petitioner had not sought certiorari, adopted the reasoning of the Seventh Circuit, stating, "Our holding is limited to the facts of this case, and we do not reach the questions that would have been raised if a certiorari petition had been properly filed." *Smaldone*, 273 F.3d at 138. The Second and Seventh Circuits continue to distinguish between situations in which a petition for certiorari review of the denial of state habeas relief is actually sought and those cases where it is not.

Although we find this distinction no longer tenable, we take each situation in turn. First, as to the question presented here, where a petition for certiorari was actually filed, we find instructive the reasoning of the dissent in *White v. Klitzkie*, 281 F.3d 920 (9th Cir. 2002). In dissent in *White*, Judge Berzon reasons that "[t]he statute surely tolls only where there is a 'properly filed application for *State* post-conviction or other collateral review.' But the question is not whether White's application fits this description . . . but whether that application

could still be 'pending' once the state courts are finished with it." *Id.* at 926 (Berzon, J., dissenting). She goes on to say, *id.*,

> [W]hile the *application* is one for *State* post- conviction relief, just as state criminal proceedings can raise federal issues reviewable in the United States Supreme Court, so can state habeas proceedings. A state criminal proceeding . . . is still "pending" even though the state courts are finished with it, until any petition filed is finally decided. Similarly, if there is a certiorari petition pending to review the validity of the state's denial of such an application for state post-conviction review, the *application* is still "pending"--that is, not finally decided. The application does not thereby stop being a state habeas proceeding or turn into a federal rather than a state application; it is just not finally decided yet.

We agree. In a slightly different context, the Supreme Court, in *Carey v. Saffold*, discussed the word "pending": "The dictionary defines 'pending' (when used as an adjective) as 'in continuance' or 'not yet decided.' It similarly defines the term (when used as a preposition) as 'through the period of continuance . . . of,' 'until the . . . completion of.'" 536 U.S. at 219 (citing Webster's Third New International Dictionary 1669 (1993)). We believe that a petition for certiorari from a state court's denial of an application for habeas corpus necessitates that the application is still pending, because it is "'in continuance' or 'not yet decided.'" *Id.* The focus of section 2244(d)(2) is not on the court in which the application is pending but on the application itself. As long as the petition for certiorari involves an application for state court relief, section 2244(d)(2) requires that the statute of limitations be tolled. The court where the application is pending is irrelevant. While *Duncan* clarified that "State" modifies "review," it nowhere asserts that "State" also modifies "pending."

Judge Berzon's dissent in *White* continues, 281 F.3d. at 926-27:

> *Duncan v. Walker*, 533 U.S. 167, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001), does not suggest a different interpretation of § 2244(d)(2). That case based its holding that a federal habeas petition does not toll the limitations period on the ground "that an application for federal habeas corpus review is not an 'application for State post-conviction or other collateral review' within the meaning of 28 U.S.C. § 2244(d)(2)." *Id.* at 2129. But an application for state habeas review, as opposed to an application for federal habeas review, is "an application for State post-conviction review or other collateral review," regardless of whether that application is being considered on appeal by a state supreme court or by the United State Supreme Court on certiorari. Thus, unlike the reading of § 2244(d)(2) rejected in Duncan, the interpretation I suggest gives full meaning to the word "State," but recognizes that the United States Supreme Court . . . can consider state . . . cases when they raise federal issues. Otherwise, what is the United States Supreme Court hearing when it considers a state habeas petition on certiorari? Not an application for federal post-conviction or other collateral review.

We agree with Judge Berzon's reasoning.

Furthermore, to require a petitioner to file his petition seeking federal habeas corpus relief before he has sought certiorari to the Supreme Court does not promote the finality of state court determinations and encourages the simultaneous filing of two actions seeking essentially the same relief. This disposition would also raise concerns about comity and exhaustion. If we chose to follow the panel decision in this case, a prisoner could file his petition for writ of certiorari to the United States Supreme Court on the day the highest state court denies him collateral relief, but if the United States Supreme Court takes more than a year to decide his case, the prisoner will be required to file a federal habeas petition before the Supreme Court had an opportunity to rule on his motion for state collateral relief. We doubt that Congress intended, in the Anti-Terrorism and Effective Death

Penalty Act, to force prisoners to choose between federal habeas relief and seeking certiorari to the Supreme Court, or to do both simultaneously. While as a practical matter it is unlikely that many petitioners will be put in this position, because the federal habeas court could simply stay the habeas motion pending the Supreme Court's resolution of the certiorari petition, *see Miller*, 311 F.3d at 580-81, we do not believe it is appropriate or necessary to read the federal statutes to dictate such a rule.

We now turn to the question directly at issue in *Isham*, although not presented here, whether or not the period for filing certiorari tolls the statute of limitations where no petition is actually filed. Once a state supreme court has ruled on a petitioner's application for state post-conviction relief, the petitioner has ninety days to decide whether to petition for a writ of certiorari. Sup. Ct. R. 13. Section 2244(d)(2) provides that the one-year statute of limitations is tolled while a properly filed application for state post-conviction relief is "pending," 28 U.S.C. § 2244(d)(2), but it offers no clue as to whether an application is "pending" during the ninety-day period for seeking Supreme Court review. If that determination depends on whether a petitioner ultimately applies for a writ of certiorari, then courts and litigants can never know whether the statute of limitations is running during the period following their state post-conviction review; that determination will depend on events that are to happen down the road.

Indeed, petitioners who are equally diligent may face drastically different fates. Imagine, for example, two state inmates who file their petitions for state post-conviction relief after three hundred days in their limitation period have run. Sixty-five days after their applications for state post-conviction relief are denied, having passed through the highest appellate court in the state, their limitations period under section 2244(d)(1) will expire. On the seventieth day, each proceeds to another stage in the process: one files a petition for habeas corpus relief in federal district court, and because that petition is untimely, the petition is denied; the other petitions for a writ of certiorari from the United States Supreme Court, and not only is the petition accepted for filing,

but also the petitioner still has sixty-five days left to file a habeas corpus petition after the petition for a writ of certiorari is denied. That is, the petition for writ of certiorari would have *retroactively* tolled the second petitioner's limitations period, protecting his ability to seek section 2254 relief. The first petitioner, who was equally diligent — and who chose what is likely a more efficient route to federal habeas review — will be out of luck. Furthermore, a rule limiting the tolling to only those habeas corpus petitioners who actually file for certiorari would create a lock-in effect for the prison inmate who prepares a certiorari petition for sixty-nine days, but then changes tack on the seventieth day, deciding that it would be wiser strategically to file the habeas petition in the district court. Under the rule applied by a majority of our sister circuits, the inmate has to file a protective certiorari petition in order to preserve the opportunity to later file a habeas petition, generating an unnecessary and quite often futile hoop through which the inmate must hop. Failure to file such a protective certiorari petition because of a tactical change then retroactively obliterates the sixty-five days the inmate had left, even though the clock was not actually ticking during the sixty-nine days spent preparing the certiorari petition to the Supreme Court.

It makes little sense to allow events that happen after a limitations period appears to have expired to retroactively toll it, and the Supreme Court has explicitly rejected such a suggestion for collateral attacks by federal prisoners. In *Clay,* the Supreme Court held that the limitations period for a section 2255 petition does not run during the ninety-day period for seeking certiorari, even when the petitioner ultimately does not seek Supreme Court review. 123 S. Ct. at 1075. The only possible basis for distinguishing the Court's interpretation in *Clay* is that whereas there, the Court determined that a case does not become "final" in the postconviction context until the conclusion of the time for seeking Supreme Court review, here, a court would be asked to determine when an application is no longer "pending." Although a case may not be "final" until the ninety-day period has expired, the argument goes, it is no longer "pending" once the state court

has actually issued an order. This argument overlooks the almost tautological point that a case becomes "final" once it is no longer "pending"; they are but two sides of the same coin. Moreover, in *Carey*, the Supreme Court rejected the notion that a case is only "pending" for the purposes of section 2244(d)(2) until the court issues its order. 536 U.S. at 219-20. The Court there concluded that an application for state post-conviction relief is pending even during the period between one state court's decision and the litigant's appeal to the next level. Accordingly, "pending" should not be construed to refer only to the time a court takes to evaluate a case at some stage of the post-conviction review process; "pending" also refers to the time allowed an inmate to file a certiorari petition regardless of whether such filing actually occurs.

A statute of limitations should be clear. At any given point, courts and litigants should be able to determine whether the limitations period has begun, is running, is tolled, or has expired; whether a limitations period is running should not depend on events that happen only at a later date. Whether the limitations period is tolled during the ninety days that a petitioner has to seek certiorari should not depend on whether the petitioner actually decides to seek certiorari.

Because *Clay* explicitly holds that *federal* petitioners are to receive the benefit of the ninety-day certiorari period even when they seek no such relief, because *Carey* advances a broad definition of when a petition for state relief is "pending" under section 2244(d)(2), and because the contrary view leads to an unstable limitations scheme prone to subsequent revision, we hold that under section 2244(d)(2), the statute of limitations is tolled from the filing of an application for state post-conviction or other collateral relief until the conclusion of the time for seeking Supreme Court review of the state's final judgment on that application independent of whether the petitioner actually petitions the Supreme Court to review the case.

For the foregoing reasons, we AFFIRM the judgment of the district court with respect to the timeliness of Abela's habeas

petition, and the case is otherwise returned to the original panel for consideration on the merits.

DISSENT

SILER, Circuit Judge, dissenting. The position espoused by the majority sounds good and provides an easy way to determine whether the one-year limitations period under 28 U.S.C. § 2244(d)(1) is tolled. However, it is a position which has been repudiated by all other Circuits which have interpreted this statute and is a stretch of the law. After all, "Our task is to construe what Congress has enacted. We begin, as always, with the language of the statute." *Duncan v. Walker*, 533 U.S. 167, 172 (2001).

As the majority correctly analyzes the issue, it is whether the time under 28 U.S.C. § 2244(d)(2) for tolling purposes also includes the time between the denial of petitioner's state post-conviction claim and the denial of his petition for a writ of certiorari on that claim before the Supreme Court. The majority holds that this time is also included. We previously held in *Isham v. Randle*, 226 F.3d 691, 692 (6th Cir. 2000), *cert. denied*, 531 U.S. 1201 (2001), that the time was not included for tolling purposes when the petitioner did not seek certiorari review of his collateral attack. I would extend that holding from *Isham* to the present situation, where the petitioner did file for certiorari to the Supreme Court. In addition to refusing to apply *Isham*'s reasoning to circumstances in which the petitioner has filed for certiorari review following exhaustion of post-conviction relief, the majority of this court, while conceding that the issue is not properly before us, nonetheless suggests in dicta that *Isham* itself is not good law. Rather than casting doubt upon *Isham*, I would extend its holding to the present situation, in which the petitioner did file for certiorari to the Supreme Court. Thus, I would find that the time between May 28, 1998, when the Michigan Supreme Court denied leave on Abela's motion for relief from judgment until October 19, 1998, when the Supreme Court denied certiorari, is not excludable time for tolling under 28 U.S.C. § 2244(d)(2). The reasons are explained herein.

As the majority explains, there is no Circuit authority in Abela's favor. *Morris v. Horn,* 187 F.3d 333, 337 (3d Cir. 1999), is the only case to hold that the statute of limitations is tolled under § 2244(d) during the pendency of a petition for certiorari, following the denial of post-conviction relief. However, that case has been repudiated in *Miller v. Dragovich*, 311 F.3d 574, 580 (3d Cir. 2002). The majority has recognized the plethora of authority in agreement with *Isham* and *Miller*. *See, e.g*, *Bunney v. Mitchell*, 241 F.3d 1151, 1155-56 (9th Cir.), *withdrawn on other grounds*, 249 F.3d 1188 (9th Cir. 2001); C*rawley v. Catoe*, 257 F.3d 395, 399-400 (4th Cir. 2001); *Snow v. Ault*, 238 F.3d 1033, 1035 (8th Cir. 2001); *Coates v. Byrd*, 211 F.3d 1225, 1227 (11th Cir. 2000); *Ott v. Johnson*, 192 F.3d 510, 513 (5th Cir. 1999); *Rhine v. Boone*, 182 F.3d 1153, 1156 (10th Cir. 1999).

The authority the majority here uses to justify its decision is from a dissent by Judge Berzon in *White v. Klitzkie*, 281 F.3d 920, 926 (9th Cir. 2002) (Berzon, J., dissenting). But the majority in that case very clearly held that "[a] petition for a writ of certiorari to the United States Supreme Court is simply not an application for state review." *Id.* at 924.

All of these cases follow the same basic reasoning. That is, they hold that the time under which a petition for certiorari is or could be filed is not considered the "time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2). I would adopt that reasoning also.

The plain text of the statute does not suggest otherwise. Obviously the pragmatic approach has its merits, because it promotes an efficient administration of habeas corpus cases, but if Congress sees a need to change the system, it may amend the statute just as it has in the past. The recent decisions in *Clay v. United States*, 123 S. Ct. 1072 (2003); and *Duncan*, 533 U.S. at 167, do not affect our decision in *Isham*.

More specifically, *Duncan* construed § 2244(d)(2) in the same way that *Isham* did, that is, that "State" modified both "post-conviction" and "other collateral review." *Duncan*, 533

U.S. at 172. Likewise, *Clay* followed the majority rule from the Circuits that § 2255 is interpreted to mean that "[A] judgment of conviction becomes final when the time expires for filing a petition for certiorari contesting the appellate court's affirmation of the conviction." *Clay,* 123 S. Ct. at 1075. However, that case involved the issue of when the limitations began to run on a *federal* conviction, not a state collateral attack. And, although that decision states that "[t]he Courts of Appeals have uniformly interpreted 'direct review' in § 2244(d)(1)(A) to encompass review of a state conviction by this Court," *id.* at 1077 n.3, it never takes up the issue we are facing, the interpretation of § 2244(d)(2).

Therefore, I would continue to follow *Isham* in finding that "the denial of state post-conviction relief becomes final. . . after a decision by the state's highest court," *id.* at 695, and I would reverse the judgment of the district court finding Abela's habeas corpus petition was timely filed.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-12642

JAMES COATES,
Petitioner-Appellant,

v.

THOMAS BYRD,
Attorney General for the State of Georgia,
Respondents-Appellees

Non-Argument Calendar
May 11, 2000

Appeal from the United States District Court for the Northern District of Georgia.(No. 99-00039-CV-JEC-1), Julie C. Carnes, Judge.

Before EDMONDSON, CARNES and HULL, Circuit Judges.

PER CURIAM:

James Coates filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The district court denied his application on 28 U.S.C. § 2243 statute of limitations grounds, and he appeals that denial. As explained in *Murray v. United States,* 145 F.3d 1249, 1250-51 (11th Cir.1998), we are limited in our review to the issue specified in the certificate of appealability.[6] That issue is whether the time limit for filing Coates' federal habeas

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[6] The Respondent's argument that the district court improperly granted a certificate of appealability on a non-constitutional issue is foreclosed by our recent decision in *Henry v. Department of Corrections,* 197 F.3d 1361, 1364-65 (11th Cir. 1999).

application was tolled during the ninety-day period following the Georgia Supreme Court's refusal to review the state trial court's denial of his petition for collateral relief. In other words, did the section 2244(d)(1) calendar run during the ninety-day period in which Coates could have (but did not) file in the United States Supreme Court a petition for a writ of certiorari from the denial of state collateral relief.[7]

In *Rhine v. Boone,* 182 F.3d 1153 (10th Cir.1999), the Tenth Circuit was faced with the issue of whether the actual filing of a petition for a writ of certiorari in the United States Supreme Court following the denial of collateral relief in the state courts tolled the running of the statute of limitations. The Tenth Circuit looked to the language of 28 U.S.C. § 2244(d)(2), which is the provision applicable to tolling during state collateral proceedings, and contrasted it with the language of section 2244(d)(1), which is the provision applicable to tolling during direct appeal. *Id.* at 1155-56. The statute specifies that during direct appeal the tolling lasts until (or more accurately, the limitations period begins to run from) "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." See 28 U.S.C. § 2244(d)(1)(A). By contrast, the tolling during state collateral review occurs only while the application for "State post-conviction or other collateral review . . . is pending." See 28 U.S.C. § 2244(d)(2).

As the Tenth Circuit explained in Rhine, the difference in the wording of the two provisions is significant. A judgment does not become "final by the conclusion of direct review or by the expiration of the time for seeking such review," see 28 U.S.C. § 2244(d)(1)(A), until the Supreme Court has had an opportunity to review the case or the time for seeking review has expired. *See*

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[7] We see no point in detailing the procedural facts of this case. Suffice it to say that if the running of the statute of limitations was tolled during the ninety-day period in which Coates could have filed a certiorari petition in the United States Supreme Court, his section 2254 application in federal district court was timely filed. If the statute of limitations was not tolled during that period, then Coates' section 2254 application was not timely filed.

Rhine, 182 F.3d at 1156; *cf. Griffith v. Kentucky,* 479 U.S. 314, 321 n. 6, 107 S.Ct. 708, 712 n. 6, 93 L.Ed.2d 649 (1987) (defining a state conviction as "final" for retroactivity doctrine purposes when the availability of direct appeal has been exhausted, including the denial of a certiorari petition by the United States Supreme Court or the expiration of time for seeking such review). On the other hand, an application "for State post-conviction or other collateral review . . . is pending," 28 U.S.C. § 2244(d)(2), only so long as the case is in the state courts. *See Rhine,* 182 F.3d at 1156. "A petition for writ of certiorari to the United States Supreme Court is simply not an application for state [court] review of any kind; it is neither an application for state post-conviction review nor an application for other state collateral review." *Id.* Likewise, the exhaustion of state remedies, which is a prerequisite to federal habeas review, does not require a prisoner to seek certiorari review in the Supreme Court of the state courts' denial of his state collateral petition. *See id.* The Fifth Circuit reached the same conclusion about this issue as did the Tenth Circuit, and for the same reasons. *See Ott v. Johnson,* 192 F.3d 510, 513 (5th Cir.1999).

We agree with the Tenth and Fifth Circuits that the time during which a petition for writ of certiorari is pending, or could have been filed, following the denial of collateral relief in the state courts, is not to be subtracted from the running of time for 28 U.S.C. § 2244(d)(1) statute of limitations purposes.

AFFIRMED.

SUPREME COURT OF THE UNITED STATES

No. 468

BELL
v.
UNITED STATES

May 9, 1955

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

James R. Browning, acting under appointment by the Court, 348 U.S. 924, argued the cause and filed a brief for petitioner.

Charles F. Barber argued the cause for the United States. With him on the brief were Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg and Carl H. Imlay.

Warren, Black, Reed, Frankfurter, Douglas, Burton, Clark, Minton, Harlan

Author: Frankfurter

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

Once more it becomes necessary to determine "What Congress has made the allowable unit of prosecution," *United States v. Universal C. I. T. Credit Corp.*, 344 U.S. 218, 221, under a statute which does not explicitly give the answer. This recurring problem now arises under what is familiarly known as the Mann Act. The relevant provisions of the Act in its present form are:

> "Whoever knowingly transports in interstate or foreign commerce . . . any woman or girl for the purpose of

prostitution or debauchery, or for any other immoral purpose . . . .

"Shall be fined not more than $5,000 or imprisoned not more than five years, or both."

2 of the Act of June 25, 1910, 36 Stat. 825, now 18 U. S. C. 2421.

The facts need not detain us long. Petitioner pleaded guilty to violations laid in two counts, each referring to a different woman. Concededly, the petitioner transported the two women on the same trip and in the same vehicle. This was the basis of his claim that he committed only a single offense and could not be subjected to cumulative punishment under the two counts. The District Court rejected this conception of the statute and sentenced the petitioner to consecutive terms of two years and six months on each of the two counts. On appeal from denial of a motion to correct the sentence, the Court of Appeals affirmed the District Court. "While the act of transportation was a single one," it ruled, "the unlawful purpose must of necessity have been selective and personal as to each of the women involved. . . . We therefore believe that two separate offenses were committed in this case." 213 F.2d 629, 630. This decision was in accord with decisions of other lower federal courts, but a contrary holding by the Court of Appeals for the Tenth Circuit, in *Robinson v. United States,* 143 F.2d 276, raised a square conflict for settlement by this Court. This led us to bring the case here. 348 U.S. 895.

The punishment appropriate for the diverse federal offenses is a matter for the discretion of Congress, subject only to constitutional limitations, more particularly the Eighth Amendment. Congress could no doubt make the simultaneous transportation of more than one woman in violation of the Mann Act liable to cumulative punishment for each woman so transported. The question is: did it do so? It has not done so in words in the provisions defining the crime and fixing its punishment. Nor is guiding light afforded by the statute in its entirety or by any controlling gloss. The constitutional basis of the statute is the withdrawal of "the facility of interstate

transportation," *Hoke v. United States,* 227 U.S. 308, 322, though, to be sure, the power was exercised in aid of social morality. Again, it will not promote guiding analysis to indulge in what might be called the color-matching of prior decisions concerned with "the unit of prosecution" in order to determine how near to, or how far from, the problem under this statute the answers are that have been given under other statutes.

It is not to be denied that argumentative skill, as was shown at the Bar, could persuasively and not unreasonably reach either of the conflicting constructions. About only one aspect of the problem can one be dogmatic. When Congress has the will it has no difficulty in expressing it -- when it has the will, that is, of defining what it desires to make the unit of prosecution and, more particularly, to make each stick in a faggot a single criminal unit. When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. And this not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or antisocial conduct. It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment. This in no wise implies that language used in criminal statutes should not be read with the saving grace of common sense with which other enactments, not cast in technical language, are to be read. Nor does it assume that offenders against the law carefully read the penal code before they embark on crime. It merely means that if Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses, when we have no more to go on than the present case furnishes.

Reversed.

Disposition

213 F.2d 629, reversed.

MR. JUSTICE MINTON, with whom THE CHIEF JUSTICE and MR. JUSTICE REED join, dissenting.

The statute does not seem ambiguous to me. Congress made it clear enough for me to understand that it was trying to help the States as far as it could to stamp out the degradation and debauchery of women by punishing those who engaged in using them for prostitution. The only way Congress could do that was to make it unlawful to use the channels of commerce to transport them. The statute provides that,

> "Whoever knowingly transports in interstate or foreign commerce . . . any woman or girl for the purpose of prostitution . . . .
>
> "Shall be fined not more than $5,000 or imprisoned not more than five years, or both."

36 Stat. 825, 18 U. S. C. 2421.

To me the statute means that to transport one or more women or girls in commerce constitutes a separate offense as to each one. Congress had as its purpose the protection of the individual woman or girl from exploitation, and the transportation of each female was to be punished. It was not concerned with protection of the means of transportation. Surely it did not intend to make it easier if one transported females by the bus load. A construction of the statute that reaches that result does violence to its plain wording. That is what the District Court thought, that is what the Court of Appeals thought, and with that I agree, and would affirm.